IN THE SUPREME COURT OF THE UNITED STATES

MUTUAL OF OMAHA INSURANCE COMPANY,
Petitioner,

-VS-

No: 79-238

DOROTHY AYLESWORTH,
Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Several matters related in the Respondent's Response to Petitioner's Petition for Certiorari call for a reply.

We contend that litigants are entitled to consideration from the Court of Appeals that is judicial in nature and that: (1) judicial consideration cannot include the reaching of factual conclusions beyond what is supported by the record; (2) that judicial consideration in diversity cases must include consideration of a state Supreme Court decision regarding the issue the Court of Appeals deemed pivotal in the case; (3) judicial consideration cannot include weighing the reputations and experience of the judges whose decisions are being reviewed.

In his response, counsel for Respondent Dorothy Aylesworth contends that expanding upon the record facts "is the valid product of the court's understanding of its appellate function." (Respondent's Brief, p. 8); and that in ignoring the only Michigan case where the Michigan Supreme Court interpreted the term "boarding" the Court of Appeals "was undoubtedly aware of the expended [sic] state of current Michigan law. . ." (Respondent's Brief, p. 3); and that the Court of Appeals was justified in being "reinforced" by the decisions of two Michigan District Court Judges because "a Court of Appeals in a diversity case, should accord great weight to the conclusions of a local judge on questions of local law." (Respondent's Brief, p. 4)

We believe that Respondent's position regarding a reviewing court's ability to enlarge upon the record facts is, on its face, insupportable.

When a federal court is called upon to apply state case law, and there is no state decision explicitly decisive, we submit that then the federal court must consider a decision that is obviously pertinent. Here one case, *Formiller* v *Detroit United Railway*, 164 Mich 653, 130 N.W. 347 (1911), defined the term "boarding" in a context similar to the situation of the case

at bar. The Court of Appeals gave no evident consideration to this decision but did give consideration to other cases not nearly as analagous. Respondent's relation of cases claimed to be pertinent cannot explain why the most pertinent case of all, from the standpoint of the Court of Appeal's own analysis, was not apparently considered by the Court of Appeals when plainly this case was brought to its attention.

Contrary to Respondent's contention, no Michigan decision subsequent to *Formiller, supra,* has enlarged the concept of the term "boarding" beyond what was contained in that case. *Formiller* represents the only Michigan decision interpreting that term and when that decision received no evident consideration, total consideration given by the Court of Appeals was not equal to the standard of judicial consideration.

Respondent cites three Eighth Circuit cases, *Bergstresen* v *Mitchell,* 577 F. 2d 22 (1978), *Luster* v *Retail Credit Co.,* 575 F. 2d 609 (1978) and *Howard* v *Green,* 555 F. 2d 178 (1977), as standing for the proposition that great weight can be accorded to the decisions of a local judge regarding questions of local law. We would not argue the point if, as in *Bergstresen, Luster* and *Howard,* the local judge fully considered and analyzed Michigan law and gave cogent reasons for his conclusion. But these decisions have no applicability where the local judge, as here, gave no reasons for his conclusion, or relied upon an analysis of local law made by a foreign court whose decision was peremptorily reversed by this Court. *Massachusetts Mutual Life Insurance Co.* v *Ludwig,* 426 U.S. 479 (1976).

A United States Court of Appeals should be entitled to weigh the considered decision of a local judge interpreting local law where the local law is not explicitly decisive. This is not to say that the reputation and experience of a local judge should be weighed where the record demonstrates the local judge's consideration to be only conclusionary or based upon a foreign, reversed analysis of local law. Just as the reputation and experience of a District Court Judge would be of no moment if his decision was contrary to an explicitly decisive

state Supreme Court decision, so also, if a local judge's consideration of local law is based upon a foreign, reversed analysis or is only conclusionary, the reputation of the local judge is of no weight in a "judicial consideration."

Our complaint, here, is that in determining state law on limited, undisputed facts, if proper judicial consideration is given, a Court of Appeals fairly could conclude that the Michigan law leaves Respondent without a chance of recovery. It might so conclude if it had not added outside the record fact conclusions that the deceased insured leaned over the edge of a subway platform to see if a train was coming while he was there but momentarily. It might so conclude if it considered the Michigan Supreme Court decision, *Formiller, supra,* which held that "boarding" "means getting on the car." It might so conclude if it had not been "reinforced" by the reputation and experience of the District Court Judges whose decisions it was obliged to judge.

In short, we are saying that the truncated review of the Court of Appeals, demonstrated by the shortened opportunity at oral presentation and its cursory opinion evidences a failure to consider what should be considered and a weighing of factors not pertinent to a judicial consideration. Thus, the Court of Appeals has denied Petitioner a meaningful opportunity to petition the Federal Judiciary for a redress of its grievances, and denied it a fair, full and rightful judicial hearing as allowed by law, 28 U.S. C. Sec. 1291.

Administrative and legislative decisions can be made without confinement to singular factual circumstances and with reliance on the work of subordinates. Judicial decisions cannot have these elements as a part of their consideration. Docket pressures must not allow the substitution of administrative or legislative consideration for judicial consideration, for what is appropriate for administrative or legislative decisions is not fair regarding the resolution of individual disputes. Consideration of individual disputes by means appropriate to legislation or administration in the trappings of a judicial hearing substitutes gestures of fairness for fairness fundamental to the judicial process.

A peremptory reversal of the decision of the Court of Appeals would demonstrate this Court's concern in maintaining historical judicial fairness in judicial review hearings. Such a decision could have the therapeutic value of establishing that expediency will not be allowed to erode the necessary judicial fairness concepts basic to a system of individual dispute resolution.

This Court demonstrated the necessity for its vigilance in maintaining fundamental fairness in quasi-judicial administrative review proceedings in the two cases of *Morgan* v *United States*, 298 U.S. 468 (1936) and 304 U.S. 1 (1938). Any less vigilance regarding judicial review proceedings would be a denial of substantial justice and would encourage eroding historic fairness concepts as a concession to docket pressures.

CONCLUSION

WHEREFORE, Petitioner prays that a writ of certiorari be granted and that this Court peremptorily order that this case be reversed and remanded to the United States Court of Appeals for the Sixth Circuit for consideration by a different panel.

Respectfully submitted,

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